

1 FOR LUCKY LITTER:

MR. ERIC COHEN
Katten, Muchin, Zavis &
Rosenman
525 W. Monroe Street
Suite 1600
Chicago, IL 60661

5 MR. HARRY L. "GIL" GILLAM, JR.
Gillam & Smith, LLP
303 South Washington Avenue
Marshall, TX 75670

9 FOR OURPET'S COMPANY:

MR. PAUL STORM
Storm, LLP
901 Main Street
Suite 710
Dallas, Texas 75202

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Please be seated.

3 All right. Are you the parties here in the
4 Applica matters or matter?

5 MR. SADLER: Both, Your Honor.

6 THE COURT: All right. I'll call first
7 announcements in 2:07-CV-73, Applica versus Daskocil.

8 Who's here on that one?

9 MR. SADLER: Your Honor, good afternoon.
10 Kevin Sadler, Baker Botts, here with my colleague,
11 Mr. William Beard and Ms. Betty DeRieux on behalf of
12 Applica for both cases.

13 THE COURT: Okay. And the second one, just
14 for purposes of the record, is 2:07-CV-454, Applica
15 against OurPet's.

16 Who's here for Daskocil in the 73 case?

17 MR. GILLAM: Daskocil is not present, Your
18 Honor. I think they sent a letter that they were not
19 going to come. It's Gil Gillam and Eric Cohen for Lucky
20 Litter.

21 THE COURT: Okay. And that's in the 454
22 case, correct, Mr. Gillam, or is it in the 73 case?

23 MR. GILLAM: That's the 73 case.

24 THE COURT: Okay. Well, with -- all right.
25 Go ahead.

1 MR. STORM: Paul Storm for OurPet's on the
2 454. We understood our hearing was next, so I was not
3 up at the table, but I'm here for OurPet's.

4 THE COURT: Well, you're welcome to stay for
5 both of them.

6 MR. STORM: Thank you, sir.

7 THE COURT: All right. What's the problem
8 in the 73 case? What issues are outstanding?

9 MR. SADLER: Your Honor, if I may, my
10 colleague, Mr. William Beard, is going to speak to the
11 stay and discovery issues which relate to the case you
12 just called. There's a separate motion to disqualify in
13 the OurPet's case, 454, which we can take up in any
14 order Your Honor wants.

15 THE COURT: Well, what has been resolved is
16 my question with respect to the 73 case?

17 MR. SADLER: Yes, sir, let me let Mr. Beard
18 speak to that.

19 MR. BEARD: Your Honor, since these motions
20 were filed, you're aware they were filed, I think the
21 first one back in January of last year and then several
22 months after that the second one was filed. I'm sure
23 the Court is also aware that there's an International
24 Trade Commission case pending.

25 THE COURT: Don't assume too much here,

1 Mr. Beard. I've been trying a patent case all week,
2 been preparing another one for trial for upstairs. I've
3 been dealing with getting orders and reports and
4 recommendations out on my six month list, and I've got
5 y'all here on your case. So tell me what you think you
6 need to tell me.

7 MR. BEARD: Thank you, Your Honor. When
8 those motions were filed, there was a lot of outstanding
9 discovery that we were asking the Court to compel Lucky
10 Litter to produce. We went away to the International
11 Trade Commission, and we just got back from our hearing
12 at the International Trade Commission.

13 Pursuant to the International Trade
14 Commission, a lot of the same discovery relative to one
15 of the patents that is in suit in this case, we
16 conducted a vast amount of discovery. So a lot of that
17 discovery that took place in the International Trade
18 Commission, by agreement with Lucky Litter, we agreed
19 that it was also applicable to this case, as well. So
20 we resolved many of the outstanding disputes through the
21 vehicle of the International Trade Commission.

22 Where we stand right now, Your Honor, on
23 these motions has to do with just the issues of damages,
24 our trademark infringement claim, and our unfair
25 competition claim. So when we took some of the

1 discovery of their principal -- in fact, we deposed
2 Mr. Alan Cook, who is the principal for Lucky Litter.
3 We left that deposition open to speak to the issues of
4 damages and trademark infringement intending that we
5 would come back after the ITC hearing and conduct that
6 discovery. That is within the scope of our motions to
7 compel that were filed way back when.

8 THE COURT: Okay. All right. Is there any
9 disagreement that that's what's left to decide with
10 respect to the motions to compel?

11 MR. COHEN: Your Honor, this is Eric Cohen.
12 We have produced -- with respect to the motions to
13 compel, we think there are no issues outstanding because
14 we basically produced all the documents that we have,
15 and we did an electronic production, and we ran that
16 production on agreed search terms that we worked out
17 with Mr. Beard.

18 So all of those documents and those search
19 terms applied for both this case and the ITC case. All
20 the documents that came within the ambit of those search
21 terms have been produced with the exception of search
22 terms that we ran to try to find and exclude privileged
23 documents. So we ran those search terms. We drilled
24 down on those. We excluded privileged documents. So
25 from the point of view of electronic documents, we have

1 produced everything based on the agreed search terms.

2 Mr. Beard is correct, there are -- there is
3 maybe one or two depositions which were left open
4 because of the issues on damages, and certainly if this
5 case proceeds, those will -- those will take place.
6 There's no issue there.

7 With respect to discovery on damages, we
8 produced financial information at the ITC both on sales
9 and on costs of goods sold. That will probably need to
10 be updated before we go to trial. We're certainly
11 willing to do that. Backup information, which is in the
12 form of voluminous documents, we've told Mr. Beard it's
13 available for you to inspect. We don't know if you want
14 to copy it. If you want to come up and inspect it
15 before you make a decision to copy these voluminous
16 amounts of documents at your expense, fine, come on up
17 and do it. And we made that offer, and there -- and
18 they're open.

19 So as far as we're concerned, we've produced
20 everything we have. There's nothing left to produce.
21 If there are some documents that may not have been
22 produced through the use of the search terms because
23 search terms aren't perfect with this electronic
24 discovery, we're certainly willing to look into that.
25 Mr. Beard has not identified any specific missing

1 documents, but if he does, we'll certainly work with him
2 on that and produce whatever needs to be produced.

3 THE COURT: Okay. All right. Well, it
4 sounds to me you don't agree that there's anything left
5 opened.

6 So, Mr. Beard, exactly what is it that
7 you're seeking now that you hadn't already gotten with
8 respect to trademark -- your trademark infringement
9 claim damages and your unfair competition claim damages?

10 MR. BEARD: Your Honor, when -- in fact, two
11 days ago, I submitted a letter to the Court which
12 explained that with the two motions that were --

13 THE COURT: Well, if you've got a copy, you
14 might want to hand it up.

15 MR. BEARD: I can tell you just one line
16 what it said. It simply said we have these two motions
17 that are pending, we expect that the parties can work
18 through these additional requests. If I were to make
19 specific requests for additional documents, I am
20 confident that opposing counsel will produce those to us
21 and we'll be able to move forward.

22 I simply didn't want to move these motions
23 off the calendar without bringing this discussion to the
24 Court's attention, because if I don't get those
25 documents in response to my specific requests, I'll be

1 right back here, Your Honor, with another motion to
2 compel asking them to be produced.

3 So as it stands right now, Your Honor, I
4 agree that we need to see what documents we've got. If
5 there's follow-up, I need to make those specific
6 requests and then move forward at that time.

7 THE COURT: All right. Well, in light of
8 that, I'm denying the motion as moot, without prejudice
9 to your ability to refile one with respect to any items
10 that you request in the future but that are not produced
11 and to which you believe to be -- yourself to be
12 entitled, okay?

13 What's the next thing?

14 MR. COHEN: Your Honor, we filed a motion to
15 stay this case under the provisions of 28 U.S.C.,
16 Section 1659. There are two patents that are asserted
17 against Lucky Litter. May I go to the podium, Your
18 Honor?

19 THE COURT: Yes, please do.

20 MR. COHEN: It's a little bit easier. There
21 are two patents that are asserted in this case against
22 Lucky Litter and Dorskocil. In addition, there's a third
23 patent that's asserted against Dorskocil, and let's leave
24 that aside for the moment.

25 So the two patents asserted against Lucky

1 Litter and Dorskocil, the patents that are common are the
2 '847 patent, which is a reissue, and the '302 patent.
3 The '302 patent incorporates by reference the entire
4 specification of the '847 patent. These same two
5 patents are also asserted by Applica against OurPet's in
6 the other case. When we went to trial in the ITC, we
7 went to trial only on the '847 patent because that was
8 the only patent that Applica asserted in the ITC.

9 THE COURT: That's the one to which you're
10 entitled to an automatic stay, correct?

11 MR. COHEN: That's the one which the parties
12 agree that we're entitled to an automatic stay,
13 however --

14 THE COURT: They agreed to what you were
15 entitled to, in other words, right?

16 MR. COHEN: Yes.

17 THE COURT: Okay.

18 MR COHEN: We submit that we're also
19 entitled to a stay on the '302 as a matter of law
20 because Section 1659 says that the stay applies with
21 respect to any claim that involves the same issues, and
22 there is a common issue between the '302 and '847
23 patent, and that is our inequitable conduct defense.

24 And the reason why that is a common issue is
25 because that defense arises out of the failure by

1 Applica -- and by the way, Applica controlled and
2 directed the filing of the reissue application even
3 though that application was owned by Waters Research
4 Corporation. Applica -- we have an admission in the ITC
5 that Applica directed the filing and prosecution of
6 that, and Applica always directed the filing and
7 prosecution of the '302 application.

8 Those applications, which are on common
9 subject matter, the claims are very close, not
10 identical, but because the '302 incorporates by
11 reference the entire specification of '847, there are --
12 the specification is common. The '302 has a few
13 additional features that are not found in '847.

14 During the prosecution, our defense is,
15 which they, of course, disagree with, but our
16 inequitable conduct defense is that they took
17 inconsistent positions in front of both examiners about
18 the meaning of terms in the specification, whether the
19 specification discloses a manual mode or a manual
20 operation mode. They were seeking claims for a manual
21 operation mode in the reissue. In the '302, they got a
22 rejection based on the patent that was the subject of
23 the reissue. Their claims were rejected as being
24 anticipated by that patent. They said, well, that
25 patent doesn't disclose manual operation.

1 So they took inconsistent positions under
2 the rule that was in effect and is still in effect, Rule
3 1.56 of the patent office. There is a duty to disclose
4 material information. Material information defined as
5 inconsistent positions taken before the patent office on
6 different applications. By definition, the information
7 they failed to disclose is material. And we say both
8 patents are invalid because of inequitable conduct. It
9 is the same conduct. It is the taking of inconsistent
10 positions.

11 Under that -- for that reason, we say that
12 the language in Section 1659, 28 U.S.C. Section 1659,
13 says that the stay -- we're entitled to a stay with
14 respect to a claim that involves the same issues. This
15 claim on the '302 involves the same issues, it involves
16 the inequitable conduct defense, which is an issue in
17 both cases, so we're entitled to a stay.

18 Now, the problem is there is a decision by
19 the Federal Circuit on petition for writ of mandamus,
20 which is the only way these stay issues reach the
21 Federal Circuit, In re: Princo. In re: Princo held that
22 the stay that's in effect, the mandatory stay and
23 whether it's the -- whether Your Honor agrees that it's
24 just the '847 or the '847 and the '302, that stay
25 remains in effect until all appeals from the ITC are

1 exhausted.

2 Now, the problem we have in this case is we
3 have a trial set -- we have a Markman hearing set on
4 November 13th, if I can remember my dates correctly.
5 Trial is set on April 6th. The ITC has set a deadline,
6 and usually they issue decisions on the deadline that
7 they set -- of March 2nd for the decision on the '847
8 patent.

9 If the stay remains in effect -- if Your
10 Honor grants a stay only on '847, now the question is do
11 we have a Markman hearing on just the '302 on November
12 13th? What happens if the ITC decides the case in our
13 favor and Applica decides it's not going to appeal and
14 go to trial? There's not time, we think, to do all the
15 things that need to be done in order to try the case on
16 April 6th.

17 Our suggestion is, and it's a practical one,
18 our suggestion -- and we discussed this with counsel,
19 and I apologize, Your Honor, I -- we got done with
20 the October -- we got done with the ITC trial on the
21 29th. My 40th anniversary was on the 31st, so I took my
22 wife overseas for a vacation, got back a day or two ago
23 and was thinking about this, and, actually, I drove --

24 THE COURT: I hope that you weren't thinking
25 about it on your vacation --

1 MR. COHEN: I was not thinking about this on
2 vacation.

3 THE COURT: -- overseas. Well,
4 congratulations on your 40th anniversary.

5 MR. COHEN: Thank you. My wife deserves the
6 congratulations, maybe sainthood.

7 THE COURT: We both overmarried, then, is
8 what you're telling me?

9 MR. COHEN: Yes, yes, I am, Your Honor.

10 Mr. Storm and I discussed this, and it turns
11 out his trial date is November 2nd. Our suggestion is
12 this, enter a stay on both patents. Consolidate our
13 case with the case against OurPet's, and by the way,
14 Daskocil agrees with that. Daskocil would agree with
15 that.

16 It is possible, but I can't guarantee it, it
17 is likely, very probable we'll have a decision from the
18 ITC on March 2nd. If we lose, we, of course, are going
19 to appeal. But if they lose, they've got a -- if we
20 lose, they get an exclusion order which is like an
21 injunction. So if there's a delay in getting a trial,
22 the only delay is on damages because under the exclusion
23 order, we wouldn't be selling the accused product.

24 If they lose on March 2nd, we can still get
25 to trial because they don't have to appeal and the ITC

1 ruling doesn't bind anybody in this case. If the trial
2 is set for November 2nd, then there are six months for
3 us to do whatever discovery we need to do. We have done
4 most of the discovery in the ITC on liability. There's
5 very little remaining to do because when we produce
6 witnesses, we, and Mr. Beard agreed, you're going to do
7 our witnesses for both cases. We did their witnesses
8 for both cases. There may be a little bit more to do
9 on the '302, but not much.

10 And the schedule, as I understand it, in the
11 OurPet's case has a Markman hearing for June 9th. Well,
12 we could certainly be in a position to do a Markman
13 hearing on June 9th. We would have the ITC's decision
14 on the '847 patent. We would be probably briefing off
15 of that decision explaining why it's right or why it's
16 wrong. It will certainly -- it doesn't bind Your Honor,
17 but it certainly would crystalize the issues and
18 probably -- probably save Your Honor and everybody else
19 a lot of work.

20 We could -- because these patents have
21 common -- large parts of the specifications are common,
22 I think it would make sense to do the Markman hearing on
23 both patents at the same time. So assuming no appeal,
24 assuming they lose, if they lose, then we go to trial.
25 They don't have to appeal. We just go to trial on

1 November 9th. So we think that makes sense because it
2 gives this Judge -- this Court one trial instead of two
3 or more than two.

4 If we only stay -- if we keep our trial date
5 and only stay the case as to the '847, we go to trial on
6 the '302, then we have to try another case on the '847.
7 We have a jury that gets empanelled, and they've got to
8 hear the same witnesses on the same products twice, and,
9 actually, for us it will be the third time because we've
10 already tried this same case in the ITC.

11 And so we think from the point of view of
12 judicial economy, it makes sense to consolidate the
13 cases. Stay this case now. We'll come back to Your
14 Honor -- we'll report back to Your Honor on March 3rd or
15 March 4th as to what has happened in the ITC, and I
16 guarantee Your Honor that my client would be in a
17 position to tell Your Honor the day after whether or not
18 we're going to appeal or what we're going to do.

19 Now, my client -- I know that this -- my
20 client is very small. We have 10 employees. My client
21 really can't afford to try this case three or four
22 times. I can't speak for Mr. Storm, but my
23 understanding is Mr. Storm's client is in the same
24 position as mine.

25 THE COURT: Who does the manufacturing for

1 your client?

2 MR. COHEN: The -- our product -- our
3 product is manufactured in China.

4 THE COURT: I was asking that to follow up
5 on the ITC issue, so the manufacturing of it is imported
6 by your client --

7 MR. COHEN: Correct.

8 THE COURT: -- from China? Okay.

9 MR. COHEN: Right. And they have -- our
10 manufacturer has an exclusive agreement with us. If we
11 are enjoined or if there's an exclusion order that's
12 issued against us, my client will instruct its
13 manufacturer immediately to stop importing into the
14 United States. And I'll make that representation to
15 this Court, that is what we will do. We play by the
16 rules.

17 THE COURT: Okay. Thank you.

18 Mr. Beard, response?

19 MR. BEARD: Your Honor, a little more
20 background, I think, would be helpful at this point.

21 There are three patents that are currently
22 at issue before this Court. They are the '302, the
23 '847, and the Carlisi patent. They are two defendants
24 that are in this case, Lucky Litter and Daskocil.
25 Daskocil is not represented here today.

1 Dorskocil has two separate products that are
2 at issue, so when these patents -- all three patents
3 cover both of those products. With respect to Lucky
4 Litter, only the '847 patent and the '302 patent are
5 being asserted against the Lucky Litter product. When
6 we went to the -- and just for context, there's the
7 OurPet's Company that's in the second case. Only the
8 '302 patent and the '847 patent are being asserted
9 against their product.

10 So when we went to the International Trade
11 Commission, we picked the one patent. The International
12 Trade Commission is very streamlined, tried to get
13 everything through as quick as we could. One patent was
14 chosen. It was the '847 patent. And that covered all
15 of the products except for one of Dorskocil's. So that's
16 why that -- that patent was chosen, and that's why it
17 was litigated at the International Trade Commission.

18 The next big thing to think about here is
19 what is the relationship of the '302 patent and the '847
20 patent, because, Your Honor, the stay is mandatory as to
21 the '847 patent, but it is discretionary as to all other
22 issues in the case to the extent they are not similar.
23 The cases that analyze this similarity --

24 THE COURT: He's telling me that it's
25 mandatory, as I understood it, with respect to the '302

1 due to the presence of an inequitable conduct defense
2 directed toward both patents, if I understood him.

3 MR. BEARD: That's the argument I heard, as
4 well, Your Honor.

5 THE COURT: Well, why is that wrong?

6 MR. BEARD: That is wrong because the issue
7 is similarity of patents. The cases analyze all of the
8 patents and whether there's a relationship between those
9 patents to figure out whether, in fact, there is
10 similarity of issues. The '302 patent is not at all
11 part of the same family as the '847 patent.

12 And, again, part of the history here is a
13 gentleman by the name of Mr. Waters is the inventor of
14 the '847 patent. When he got his patent, he got his
15 business up and running and had his LitterMaid products
16 being sold, Applicia came along and bought that business
17 from him and obtained an exclusive license to the '847
18 patent.

19 Their inhouse engineers then improved the
20 product and added to it an additional feature, which is
21 a safety mechanism that is important so that cats, when
22 they enter the box, don't get hurt or maimed. That is
23 the focus of the '302 patent. So when --

24 THE COURT: Was there a big problem with
25 that?

1 MR. BEARD: There actually --

2 THE COURT: I'm being serious.

3 MR. BEARD: There actually had been some
4 instances where people -- yeah, there were problems with
5 cats having been hurt, so --

6 THE COURT: Okay.

7 MR. BEARD: -- so there was a real reason
8 for this second invention to come along, and that wasn't
9 discovered as an issue until Applicia Consumer Products
10 got ahold of the business and started manufacturing
11 their products, and then this issue came up, and the
12 solution to that was invented by Mr. Arnold Thaler who
13 was an employee of Applicia.

14 So when Mr. Thaler filed his patent
15 application on behalf of Applicia, he borrowed some of
16 the same text and some of the same figures from that
17 earlier '847 patent. This is three years later. So
18 there's copendency, there's no familial relationship.
19 He just said, look, I'm starting with the same box, but
20 I'm going to add this additional safety feature
21 functionality, and that's the focus of my invention.

22 So that's why there's two separate patents
23 here. One is on the underlying box, and the '302 is an
24 improvement to it in the form of this safety feature.

25 THE COURT: Drawn toward the box with the

1 feature, correct?

2 MR. BEARD: Correct.

3 THE COURT: Okay.

4 MR. BEARD: Correct.

5 THE COURT: I got it.

6 MR. BEARD: So with that background, we see
7 that the patents are dissimilar, and most all of the
8 cases that analyze whether or not there's similarity of
9 issues and whether there's a mandatory stay, analyze
10 whether they're in the same family, are the same -- is
11 there a joint inventor that's named, those types of
12 issues, and what is the overlap in the claimed subject
13 matter?

14 And here we have dissimilar inventors. We
15 have dissimilar owners. There's no familial
16 relationship between the patents, and the claimed
17 subject matter is substantially different, wherein the
18 '847 patent relates to the underlying box, and the '302
19 is the safety feature.

20 So that's our basis for arguing that there
21 is no similarity of issues and therefore no mandatory
22 stay as to the '302 patent. It's within this Court's
23 discretion, then, to decide, well, as a matter of
24 judicial economy and such, should we stay the whole
25 issue?

1 Your Honor, besides that, there are
2 additional issues. When Lucky Litter came into
3 business, we discovered that one of the first things
4 they did was they took our trademark, which is the
5 LitterMaid trademark that Applica obtained when they
6 bought the business from Mr. Waters. That -- we learned
7 that LitterMaid took that trademark and embedded it in
8 their metadata for their advertising and it was a
9 trademark infringement. So that's the primary basis for
10 our trademark infringement claim. That's a separate
11 issue that's also a cause of action in the case that's
12 separate from any of the patent issues, and that's part
13 of what still remains to be discovered at this point.

14 So, again, a second issue that's completely
15 dissimilar or unrelated to any of the patent issues in
16 the case, that -- that is a cause of action that stands
17 alone. So when we talk about whether the Court is going
18 to exercise its discretion to stay portions of the case,
19 the '302 patent should go forward and the trademark
20 infringement claims should go forward.

21 The next thing I would bring to the Court's
22 attention is the status of the discovery that took place
23 in the case, and I made some mention of that before. By
24 agreement between the parties, when we went and deposed
25 all of the Lucky Litter witnesses and all the third

1 parties that were related to Lucky Litter, all of those
2 depositions were conducted pursuant to both this case
3 and the ITC. So we were forced to go forward and
4 conduct all of our '302 discovery. And so for all those
5 technical witnesses, we have -- you know, the discovery
6 has taken place and is water under the bridge at this
7 point for both the '847 patent and the '302 patent as it
8 relates to Lucky Litter. That's why at this point the
9 only thing remaining for us to discover are the damages
10 issues and then the trademark infringement claim.

11 So with that status, you know, the whole
12 purpose for a stay is that there wouldn't be this
13 conflicting discovery or, you know, discovery happening
14 in one instance first and then taking place again later.
15 Well, we've actually resolved that at this point by
16 having done it all together.

17 THE COURT: Well, so if I deny the stay, the
18 thing that might have to be done twice is only me
19 sitting through this case twice, once with the '302 and
20 then once with the '847?

21 MR. BEARD: Your Honor, we're not proposing
22 any scenario where this Court would sit twice, once for
23 the '847 and then again for the '302. We recognize that
24 if there's a stay to be entered as to the '847 patent
25 right now, that the date in April would be in jeopardy.

1 There would be some additional discovery that would need
2 to take place, the Markman hearing as to the -- the '847
3 patent, all of that just would not be practical for this
4 Court to be able to accomplish that in one month after
5 March 2nd until April the 9th when this case is set for
6 trial.

7 So with respect to the issue of scheduling,
8 we would propose the next earliest trial setting that
9 this Court could give the Lucky Litter case beyond --
10 this, again, assumes that a mandatory stay is the '847
11 is --

12 THE COURT: Well, I didn't think y'all were
13 disputing that there was a mandatory stay on the '847.
14 Is that -- are you disputing that or not?

15 MR. BEARD: No, Your Honor.

16 THE COURT: Okay.

17 MR. BEARD: The statute is clear.

18 THE COURT: I mean, I have to grant, then.

19 MR. BEARD: That is correct.

20 THE COURT: Okay. Well, I'm -- to the
21 extent it hadn't been granted, it's granted. And so
22 what you're telling me now is that the trial that I've
23 got set in April is -- I don't need to plan on having it
24 is what you're telling me?

25 MR. BEARD: That is correct, Your Honor.

1 THE COURT: Okay. So then the issue would
2 be whether or not I would stay, then, the '302 for
3 discretionary reasons or if I deny the stay, then you
4 just want me to reset the case on both patents for some
5 time, and I don't know what time that would be. You
6 know, give me a suggestion. I mean, I --

7 MR. BEARD: Your Honor, our dream would be
8 sometime in June or July would be the trial setting,
9 that way we right now, with the discretionary -- with
10 there being no stay as to the '302 patent and the
11 damages issues and the trademark, we would be able to
12 get a lot of that discovery done. Anything else that
13 needs to be cleaned up after the stay as to the '847
14 would be lifted, and then we'd be ready for trial at the
15 Court's earliest opportunity. That way we're having one
16 trial on both the '847 patent and the '302 patent.

17 THE COURT: Well, tell me what happens if,
18 from a procedural standpoint, if you win at ITC and then
19 they notice an appeal. The stay, as I understand it,
20 extends through the appeal; is that right?

21 MR. BEARD: That was brought to my
22 attention. Counsel provided us a case. It was not my
23 understanding that that was the law prior to an hour
24 ago, and I have not reviewed the law on that to see
25 where that stands. My understanding was was that the

1 statute says upon final, and by statute, the ITC
2 decisions will be as follows: The administrative law
3 judge will issue its initial determination on December
4 2nd. By statute, two months later the Commission will
5 issue its decision on February 2nd, and then there's the
6 30-day wait period which means March 2nd, it's final.

7 THE COURT: So in your view, final, for
8 purposes of the expiration of the stay, is the same
9 finality that we need to attach for there to be an
10 appealable judgment; is that right?

11 MR. BEARD: And I must admit, Your Honor, I
12 have not read the case that has been brought forward and
13 researched to understand whether that, in fact, is the
14 case.

15 THE COURT: Okay. What's the status? I'm
16 asking either side, if there's an appeal, is an order,
17 you know, that bars the importation -- I don't know what
18 it's called, an impoundment order; is that right?

19 MR. BEARD: It's an exclusion order.

20 THE COURT: Exclusion order. What is the
21 effect of the exclusion order during the pendency of an
22 appeal?

23 MR. BEARD: Your Honor, I understand that we
24 would post a bond, and during an appeal, the exclusion
25 order would be in place subject to a bond.

1 THE COURT: Okay. Is that your
2 understanding?

3 MR. COHEN: Your Honor, yes, that is my
4 understanding. The Commission has -- there are three
5 forms of remedy the Commission can issue. One is a
6 general exclusion order which would apply across the
7 board. We don't think that's applicable in this case.
8 The other one is a limited exclusion order which applies
9 only as to the parties. That is like an injunction. It
10 is an order that prevents the importation of product
11 into the United States.

Ours is made in China, as we told Your Honor, so that would prevent the importation of the product that was at issue in the ITC case into the United States, and then the ITC also has authority to grant a cease and desist order which would apply if it granted it against product that had been imported prior to the order in the United States. So it's like an injunction.

20 THE COURT: Okay. Okay. So, Mr. Beard, to
21 the extent that the stay extends beyond the final order
22 from which there's been an appeal taken, it extends into
23 the appeal period, your client would be protected by the
24 order, the exclusion order?

25 MR. BEARD: The exclusion order, that is

1 correct.

2 THE COURT: Okay. Mr. Beard, in a perfect
3 world, your June or July date would be acceptable to me
4 to reset the case to, but in a perfect world, I wouldn't
5 have Markman hearings set every other week and trials
6 loading me up through the summer.

7 So what I'm going to do is -- I've
8 considered the arguments. I'm going to deny the stay
9 with respect to the '302 patent. It's granted with
10 respect to the '847 patent. I'm taking the case off the
11 docket. I'm resetting it for September the 8th. That's
12 the day after Labor Day.

13 And I want y'all to meet and confer and give
14 me a proposed docket control order that puts forth in a
15 general sense the time that y'all think y'all need to
16 get ready for a Markman hearing on the '847 after March
17 the 2nd.

18 Okay. Yes, sir?

19 MR. COHEN: Your Honor, may I -- may I be
20 heard just on two points?

21 First of all, on the -- on the trademark
22 claims, my client stopped the accused action as soon as
23 they filed their amended complaint. So, again, there's
24 no issue there going forward. They stopped, and we say
25 what they did was not a violation. There's -- but I

1 just want to make that point. So that's also a damages
2 issue.

3 Second, on the '302, the improvement that
4 Mr. Beard described, which is part of the claims that
5 are asserted against us, we don't have that improvement,
6 and what they're claiming is -- and this is a claim
7 construction issue that relates to what is in the '847
8 patent, which is why we say these things are so
9 intertwined because that -- they're saying what we're
10 doing is what was in that '847 patent. We're doing
11 exactly what was in the '847 patent. It's a motor stall
12 sensor. They didn't claim it in the '847 patent. We
13 don't have that safety feature that they added. That's
14 a claim construction issue that Your Honor is going to
15 have to decide on '302 that --

16 THE COURT: It's a Johnson and Johnson
17 issue, isn't it? If they disclosed it and not claimed
18 it in the '847, then what you're going to argue is that
19 it's dedicated, right?

20 MR. COHEN: Exactly.

21 THE COURT: Okay. Well, I'll decide that at
22 the appropriate time.

23 MR. COHEN: Exactly, Your Honor. I should
24 tell Your Honor the only way -- this stay is critical to
25 our client, and I must inform Your Honor, the only way

1 we have of challenging this order would be to file a
2 petition for a writ of mandamus, and I'm --

3 THE COURT: Well, I'm not asking you to do
4 anything that you wouldn't do to try to protect your
5 client's interest.

6 MR. COHEN: I must do that, Your Honor.

7 THE COURT: But I'm going to call them like
8 I see them. I don't think that they're as intertwined
9 as you say that they are or with the case law that you
10 cited in your brief, and I'm not offended by you taking
11 such action as you would like -- as you believe is
12 necessary to represent your client.

13 MR. COHEN: Thank you, Your Honor.

14 THE COURT: Okay?

15 MR. COHEN: I just wanted to make that
16 clear. I'm just doing it to protect my -- to protect my
17 client.

18 THE COURT: Listen, I mean, I'm not -- I
19 understand. But at the same time, I'm going to call
20 them like I see them here as opposed to whether or not I
21 think I'm going to get reversed, okay?

22 MR. COHEN: I appreciate that, Your Honor.

23 THE COURT: Okay. All right. Does that
24 take care of everything in the first Applica matter?

25 MR. SADLER: Yes, Your Honor, from the

1 plaintiff, everything in the first case.

2 THE COURT: Okay. Okay. All right. Y'all
3 are excused, then, unless you just want to stick around.

4 Mr. Gillam, travel safely back to your
5 office.

6 MR. GILLAM: I'll be back later, Your Honor.

7 THE COURT: Okay. Well, I'll see you then.

8 (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a
true and correct transcript from the stenographic notes
of the proceedings in the above-entitled matter to the
best of my ability.

SHELLY HOLMES	Date
Substitute Official Reporter	
State of Texas No.: 7804	
Expiration Date: 12/31/08	